

1991

# State of Utah v. William Joseph Smith : Brief of Appellant

Utah Supreme Court

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Paul Van Dam; Utah Attorney General; Attorney for Respondent.

D. John Musselman; Elkins, Musselman & Madsen; Attorney for Appellant.

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BRIEF

910350

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	Case No.
Plaintiff-Respondent,	:	
	:	Utah Supreme Court 910350
vs.	:	District Court 901400470
	:	
WILLIAM JOSEPH SMITH,	:	
	:	
Defendant-Appellant.	:	

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BRIEF OF DEFENDANT-APPELLANT

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APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY,  
A FIRST DEGREE FELONY  
IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH  
  
THE HONORABLE RAY M. HARDING, PRESIDING

---

PAUL VAN DAM  
UTAH ATTORNEY GENERAL  
236 State Capitol  
Salt Lake City, UT 84114  
Attorney for Plaintiff-Respondent

D. JOHN MUSSELMAN  
ATTORNEY AT LAW  
ELKINS, MUSSELMAN & MADSEN  
40 South 100 West, #200  
Provo, UT, 84601  
Attorney for Defendant-Appellant

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UTAH

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PAUL VAN DAM  
UTAH ATTORNEY GENERAL  
236 State Capitol  
Salt Lake City, UT 84114  
Attorney for Plaintiff-Respondent

D. JOHN MUSSELMAN  
ATTORNEY AT LAW  
ELKINS, MUSSELMAN & MADSEN  
40 South 100 West, #200  
Provo, UT, 84601  
Attorney for Defendant-Appellant

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BRIEF OF DEFENDANT-APPELLANT

---

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Rule 26, Utah Rules of Criminal Procedure.

NATURE OF THE PROCEEDINGS

Defendant appeals his conviction for a First Degree Felony, Aggravated Robbery, in violation of Section 76-6-302, Utah Code Annotated, 1953, as amended. Defendant entered a plea of not guilty to the charge on the 21st day of December, 1990. The case was then tried to a jury on January 28th and 29th, 1991 and the jury returned a verdict of guilty as charged. On the 22nd day of February, 1991, the defendant was sentenced to serve a term of not less than five (5) years to life in the Utah State Prison.

### STATEMENT OF ISSUES ON APPEAL

The issues presented on appeal of this matter is whether the testimonies of Terrence Bryant and Michelle Dominge were applicable or reliable and whether the Judge erred by not allowing the defendant the privilege of probation. Concurrent herewith, defense counsel has submitted a Motion for Leave to Withdraw as Counsel, pursuant to the case of State v. Clayton, 639 P.2d 168 (Utah 1981) and Anders v. California, 386 U.S. 736, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

### STANDARD OF REVIEW

The standard of review for the issues presented in this case are as follows:

a. As to Point I and Point II the standard is whether there was substantial evidence to justify the verdict returned by the jury, and

b. As to Point III the standard is whether the court abused its discretion in disallowing the defendants privilege of probation and sentencing the defendant pursuant to statute.

Defense counsel asserts that neither point can substantially be raised as an issues in good faith and therefore resubmits a Motion for Leave to Withdraw as Counsel, pursuant to the case of State v. Clayton, 639 P.2d 168 (Utah 1981) and Anders v. California, 386 U.S. 736, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

### STATEMENT OF THE CASE

Defendant was originally charged with the crime of Aggravated Robbery, a First Degree Felony, in violation of Section 76-6-302, Utah Code Annotated, 1953, as amended. On February 22, 1991, the defendant came before the Court for sentencing. At that time, the Court sentenced the defendant to the Utah State Prison for a term of not less than five (5) years to life.

### STATEMENT OF FACTS

The Smith Food King on 200 West in Provo, Utah was robbed on November 23, 1990 at approximately 10:20 a.m. The lone bandit wore a disguise of a wig, glasses and a heavy overcoat. The bandit approached the courtesy booth just inside the front door of the store and displayed a handgun to the two clerks on duty and demanded that the clerks put all of their money in a bag which the bandit supplied. The clerks complied and the bandit left through the front door from whence he came. A customer, Hether Kessel, noticed a man leaving as she approached the store and witnessed the man enter a late model red car with a white convertible top and drive off.

After a period of some eleven (11) days without a suspect, a tip was received from one Terrence Bryant through his parole officer, Mr. Crawford in Salt Lake City. He reported that an acquaintance of his, William Joseph Smith, had committed the robbery and had so stated to him. With the permission of the informant, a recording device was installed on his home telephone



and the authorities waited for a call from Smith. A call came and the conversation was recorded by way of the tap.

A warrant of arrest was obtained for William Joseph Smith and the arrest was made on November 29, 1990. At the time of the arrest, Smith was driving a 1979 Mercury Zepher. At the time of the arrest certain items were seized including certain items of clothing and ski equipment which was in the trunk of Smith's vehicle; a small automatic handgun which was in the trunk of the vehicle; and a number of one dollar bills.

Following further investigation, the employees of Budget Rent-a-Car at the Salt Lake Airport reported that a man using the name of William Joseph Smith had rented a 1989 Chrysler LeBaron convertible on November 15, 1990 at 10:16 p.m. and had returned the car on November 24, 1990 at the hour of 9:27 a.m..

At the trial of this matter, the State introduced the actual audio recording of the telephone conversation between Terrence Bryant and the caller who Bryant identified as Smith; testimony from Bryant relating other incriminating statements attributed to Smith; testimony of Pete Giles, one of the clerks at Smith's who testified that he could positively identify the gun as that used in the robbery and identified Smith as the robber based on his "skin texture"; testimony of Michelle Dominge, the other clerk at Smith's who first testified that she could not identify anyone in the courtroom as the robber but later returned to the stand and testified that she could identify Smith as the robber based on a crease on his cheek which she could see when earlier leaving the

witness stand; the gun found in the trunk of Smith's car; the clothes found in Smith's car; photographs of a red Chrysler LeBaron convertible owned by Budget Rent-a-Car; testimony of the employees of Budget Rent-a-Car who testified that a man using the name of William Joseph Smith rented a car such as the car photographed from November 15, 1990 to November 24, 1990 but could not say whether the actual car rented was the one photographed nor the color of the car actually rented; and a copy of the rental contract purportedly signed by Smith.

Smith called Michelle Smith, Stacy Mullens, and Shantell Gillespie, as alibi witnesses who testified that Smith was at his home in Murray, Utah at the time of the robbery.

Following a trial to a jury on the above facts, Smith was convicted of Robbery, a First Degree Felony and was sentenced to the statutory term of not less than five (5) years nor more than life in the Utah State Prison.

#### SUMMARY OF ARGUMENT

Defendant asserts the verdict is not justified in light of the plea of alibi and of the evidence pertaining to it and in light of the lack of credibility of the testimony of Mr. Terrence Bryant. Defendant further asserts that Michelle Dominge, witness for the State, should have not been allowed to retake the stand on the grounds that her second testimony was an impeachment of her first testimony. Defendant further asserts the Judge erred in sentencing the defendant to prison and the defendant should have been allowed the privilege of probation.

## ARGUMENT

### I.

TERRENCE BRYANT'S TESTIMONY IS NOT CREDIBLE, NOR RELIABLE.

Mr. Terrence Bryant is not a credible witness. His testimony was slighted by the fact that Bryant owed the defendant a large sum of money. Also, Bryant had the ulterior motive of aiding his parole officer with the taped conversation in order to stay out of prison. Counsel has determined that such does not rise to a substantial issue on appeal. Furthermore, counsel believes this issue to be a matter of fact, not of law and therefore is an issue to be decided by a jury in the original court, not on appeal. In the case of State v. Moore, 183 P.2d 937 (Utah 1947), the Utah Supreme Court states:

That part of the argument which in substance declares that the account related by the prosecutrix, in effect is a jury argument, since the jurors are the sole judges of the weight of the evidence and credibility of witnesses.

References can be found in the trial transcripts on pages 85-120 of specifically, on page 103 and page 117.

## II.

### MICHELLE DOMINGE IMPEACHED HER FIRST TESTIMONY BY BEING ALLOWED TO RETAKE THE STAND

Michelle Dominge did not identify the defendant as the armed robber. On retaking the stand, Michelle Dominge testified that she had identified the defendant by a crease in his cheek that she did not notice until she had left the stand previously, and thus impeached her first testimony. Counsel has determined that this does not rise to a substantial issue on appeal. Furthermore, counsel believes the issue is to be decided by the jury in the original court and not on appeal. In the case of State v. Gay, 307 P.2d 885 (Utah 1957), the Utah Supreme Court stated: In State v. Gay, it states; "The question of credibility of the witnesses is for the jury."

References can be found on pages 79-84 of the trial transcripts.

III.

THE COURT ERRED IN SENTENCING THE DEFENDANT TO  
PRISON AND DISALLOWING HIS PRIVILEGE FOR PROBATION.

The Judge had the discretion to sentence the defendant to prison or to allow the defendant the privilege of probation. In the case of State v. Howell, 707 P.2d 116, 117 (Utah 1985), the Utah Supreme Court stated:

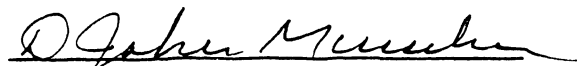
The legislature has authorized trial judges to impose statutorily specified indeterminate sentences in most cases. Nonetheless, a trial judge has substantial discretion in imposing sentence. However, the exercise of that discretion is not unlimited, and it may not be exercised on the basis of unreliable information.

Present counsel is unable to find any impropriety in the sentence given by the Court. It appears to be the exact sentence allowed by statute. Counsel is unaware of any unreliable information being considered by the Court in this case.

CONCLUSION

Counsel believes there are no meritorious grounds for appeal and a Motion for Leave to Withdraw has been submitted herewith. The Court sentenced the defendant pursuant to statute after the defendant's conviction. Defense counsel used every effort to convince the Judge that the defendant should not have been sent to prison. Defendant is unable to point to any specific action which could have been taken by defense counsel with a differing result.

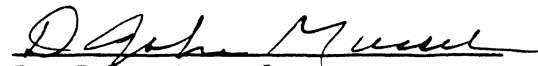
Submitted this 26 day of March, 1992.

  
D. John Musselman  
Attorney for Defendant-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Defendant-Appellant, postage prepaid, this 26 day of March, 1992, to the following:

Paul Van Dam  
Utah Attorney General  
236 State Capitol  
Salt Lake City, UT 84114

  
D. John Musselman  
Attorney for Defendant-Appellant

ADDENDUM

Rule 26, Utah Rules of Criminal Procedure

Section 76-6-302, Utah Code Annotated, 1953, as amended

EXHIBIT

Exhibit "A" - Judgement, Sentencing and Commitment

Exhibit "B" - Certification of Contact with Defendant

Exhibit "C" - Motion for Leave to Withdraw

**76-6302. Aggravated robbery.**

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or

(b) causes serious bodily injury upon another.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

History: C. 1953, 76-6302, enacted by L. 1972, ch. 194; 76-6302, 1975, ch. 51; L. 1989, ch. 170, § 7.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, rewrote Subsec-

tion (1)(a) which read: "uses a firearm or a replica of a firearm, knife or a facsimile knife or a deadly weapon" and made minor listing changes in Subsections (2) and (3).

**NOTES TO DECISIONS****ANALYSIS****Elements of offense.**

Entrapment defense unavailable.

**Evidence.**

—Insufficient.

—Prior convictions.

—Sufficient.

Eyewitness identification.

"Facsimile of a firearm."

Included offense.

Inducement or information.

Intent.

Recent possession of stolen property.

Recovery of property by force.

Unloaded firearm.

Cited.

**Elements of offense.**

In prosecution for robbery with revolver, based on defendant's alleged act of taking money from another, where defense was that, if defendant actually was guilty of the act, he took money under claim of ownership and in honest belief that he had right to it as result of card game, it was error for court to give instruction whereby jury was authorized to convict defendant notwithstanding absence of felonious intent. *People v. Hughes*, 11 Utah 100, 39 P. 492 (1895).

All essential elements were proved where evidence showed defendant took \$120 on March 10 though charged with taking \$140 on March 9, and where the victim testified the defendant had a gun stuck in the front of his jeans and evidence did not show defendant handled or pointed a gun and the gun was not found after the robbery. The date charged need only be closely proximated, the value of per-

sonal property taken is not an element of robbery, and proof that the gun was actually pointed and placed in evidence not necessary since if mere exhibition of a place the victim in fear it constitutes "use of a firearm." *In re R.G.B.*, 597 P.2d 1000 (Utah 1979).

Proof of all elements necessary to prove robbery is not required so long as there is attempt coupled with the use of a firearm, facsimile thereof, or another deadly weapon, or the accused causes serious bodily injury, the elements of aggravated robbery satisfied. *State v. Cannon*, 730 P.2d 591 (Utah 1988); *State v. Hickman*, 779 P.2d 670 (Utah 1989).

**Entrapment defense unavailable.**

Defendant charged with aggravated robbery under Subsection (1)(a), was not entitled to defense of entrapment, because the threat of serious bodily injury, which precludes entrapment, was a necessarily implied element of the offense charged. *State v. Colonna*, 766 P.2d 1000 (Utah 1988).

**Evidence.**

—Insufficient.

Defendant's conviction was reversed because the circumstantial evidence connected him to his alleged accomplice and the evidence was insufficient to prove that he was with accomplice during or immediately after robbery or that he had the requisite intent for the crime with which he was charged. *State v. Kausz*, 735 P.2d 50 (Utah 1987).

Defendant's menacing gesture accompanied by verbal threats is not sufficient evidence to establish the use of a firearm or



## COLLATERAL REFERENCES

Am. Jur. 2d. — 67 Am. Jur. 2d Robbery § 3.      affecting criminal responsibility, 68 A.L.R.4th  
 C.J.S. — 77 C.J.S. Robbery § 28.      507.  
 A.L.R. — Fact that gun was unloaded as af-      Key Numbers. — Robbery — 11.

## PART 4

## THEFT

## 76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment.

- (f) an order of the court granting a motion to withdraw a plea of , or no contest.
- (4) (a) All appeals in criminal cases shall be taken within 30 days after entry of the judgment appealed from, or, if a motion for a new trial or arrest of judgment is made, within 30 days after notice of the denial of such motion is given to the defendant or his counsel. Proof of giving notice shall be filed with the court.
- (b) An appeal may not be dismissed except for a material defect in taking it, or for failure to perfect the appeal, or upon motion of the appellant. The dismissal of the appeal affirms the judgment unless an appeal may be, and is, timely taken.
- (5) Cases appealed in which the defendant is unable to post bond shall be given a preferred and expeditious setting in the appellate court.
- (6) Appeals may be submitted on briefs. If an appellant's brief is filed, the appeal shall be decided even though a party, upon notice of the hearing, fails to appear for oral argument.
- (7) The rules of civil procedure relating to appeals govern criminal appeals to the appellate court, except as otherwise provided.
- (8) (a) In appeals to the Supreme Court of capital cases where the sentence of death has been imposed, appellant briefs shall be filed within 60 days of the filing of the record on appeal. Respondent briefs shall be filed within 60 days of receipt of the appellant brief. All issues to be raised on appeal shall be included by each party in its appellate brief. Appellant's reply briefs shall be filed within 30 days of receipt of the respondent's brief.
- (b) One 30-day extension of the 60-day filing period may be granted to each party, but only upon application to the Supreme Court showing extraordinary circumstances warranting an extension.
- (c) The Supreme Court shall schedule the oral arguments of the appeal to be heard not more than ten days after the date of filing of the final brief. Following oral arguments, the case shall be placed first on the Supreme Court's calendar, for expeditious determination.
- (9) After an initial appeal has been resolved, a subsequent appeal in a capital case where the sentence of death has been imposed may not be granted by any court, nor may a stay of execution of the sentence be granted when the appeal does not raise any new matter not previously resolved, or when new matter could have been raised at the previous appeal.
- (10) In capital cases where the sentence of death has been imposed and the defendant has chosen not to pursue his appeal, the case shall be automatically reviewed by the Supreme Court within 60 days after certification by the sentencing court of the entire record, unless the time is extended by the Supreme Court for good cause. A case involving the sentence of death shall have priority over all other cases in setting for hearing and in disposition by the Supreme Court.
- (11) The rules of practice for the Court of Appeals and circuit court promulgated by the Judicial Council and approved by the Supreme Court relating to appeals from circuit courts govern criminal as well as civil appeals.
- (12) An appeal may be taken to the Supreme Court or the Court of Appeals, as is appropriate, from all final orders and judgments rendered in a district court or juvenile court under this rule.

State had right of appeal from judgment discharging defendant, in prosecution for felony, on ground that information did not state facts sufficient to constitute public offense. *State v. McKenna*, 24 Utah 317, 67 P. 815 (1902).

The state had no right to appeal sentence imposed upon defendant since the imposition of sentence was part of the judgment, and not an order made after judgment. *State v. Keibach*, 569 P.2d 1100 (Utah 1977).

This section does not authorize the prosecution to appeal an acquittal, no matter how overwhelming the evidence against the defendant may be. *State v. Musseiman*, 667 P.2d 1061 (Utah 1983).

Where dismissal of charge was based on trial court's construction of the applicable law before the court ruled on the sufficiency of the evidence to convict, the ruling was, in effect, a "final judgment of dismissal" under Subdivision (3)(a) and therefore was appealable even though the ruling was made at the close of all the evidence. *State v. Musseiman*, 667 P.2d 1061 (Utah 1983).

The state may not, following a pretrial ruling suppressing some state's evidence, request dismissal of a criminal case in order to avoid the discretionary appeal provisions of Subdivision (3)(e) and to obtain an appeal of right under Subdivision (3)(a). *State v. Waddoups*, 712 P.2d 223 (Utah 1985).

A trial court's dismissal of a case on the ground that the prosecution has not proved an element of the offense beyond a reasonable doubt is in substance an acquittal and therefore is not appealable. *State v. Chugg*, 749 P.2d 1279 (Utah 1988).

State could not appeal an order granting defendant a new trial after he moved to arrest judgment or, in the alternative, for a new trial where the trial court did not, in substance, grant an arrest of judgment but a new trial. *State v. Owens*, 753 P.2d 976 (Utah Ct. App. 1988).

An appeal from the denial of a motion for new trial is not an appeal by the state permitted by Subdivision (3), because the state's appeal is not an appeal from a "final judgment of dismissal." An appeal by the state properly lies only from the order of dismissal and does not lie from the denial of a motion for new trial. *State v. Johnson*, 782 P.2d 533 (Utah Ct. App. 1989).

#### —Dismissals.

The language "a final judgment of dismissal" in Subdivision (3)(a) refers to dismissals where the trial court construes the applicable law before ruling on the sufficiency of the evidence to convict and before a final judgment. *State v. Amador*, 150 Utah Adv. Rep. 23 (Ct. App. 1990).

Subdivision (3) precludes appeals from

postjudgment dismissals or vacations. *State v. Amador*, 150 Utah Adv. Rep. 23 (Ct. App. 1990).

In a trial for possession of a controlled substance where, after all the evidence was in, both sides presented closing arguments, the defendant renewed his motion to suppress evidence, which was granted, the order appealed from was an acquittal and not a "dismissal" that term is used in Subdivision (3)(a) of this rule, and was not subject to appeal by the state. *State v. Willard*, 301 P.2d 189 (Utah Ct. App. 1990).

#### Applicability of civil rules.

##### —Court findings.

Rule 52(a), U.R.C.P. (effect of court findings) applies in criminal cases by virtue of Subdivision (7) of this rule. *State v. Walker*, 743 P.2d 191 (Utah 1987).

Rule 52, U.R.C.P. (findings by the court) applies to criminal actions. *State v. Goodman*, 763 P.2d 786 (Utah 1988).

##### Attorney's failure to file notice.

Where if, within the statutory period for appeal, defendant has requested counsel to file an appeal and counsel gave defendant reason to believe that he would but then failed to do so, the remedy to establish the denial of right to appeal is not in the Supreme Court by a motion for relief under Rule 65 of U.R.C.P. in the sentencing court. *State v. Johnson*, 635 P.2d 36 (Utah 1981).

If it is found upon a hearing that a defendant was induced, by reason of his attorney's representation that an appeal would be perfected, to allow his time to take an appeal to expire, that he was misled as to his right to appeal, defendant should be resentenced nunc pro tunc upon previous finding of guilt so as to allow him an opportunity of prosecuting and perfecting an appeal, since the time for taking appeal would date from the rendition of new judgment. *State v. Johnson*, 635 P.2d 36 (Utah 1981).

##### Bind over orders.

Subdivision (2)(c) governs all appeals bind over orders entered in any court. *State v. Schreuder*, 712 P.2d 264 (Utah 1985).

Defendant, a juvenile whose preliminary examination was conducted in district court rather than in circuit court, was not denied right to review of the bind over order by superior court, since he had the same right under Subdivision (2)(c) to seek review as does other criminal defendant. *State v. Schreuder*, 712 P.2d 264 (Utah 1985).

##### Death penalty cases.

While Utah law does not compel a defendant sentenced to death to go through every procedure that a defendant might voluntarily

Exhibit "A"

IN THE FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

\*\*\*\*\*

STATE OF UTAH,

MINUTE ENTRY

Plaintiff,

CASE NUMBER 901400470

-vs-

DATE FEBRUARY 22, 1991

WILLIAM JOSEPH SMITH,

RAY M. HARDING, JUDGE

Defendant.

Rept: Vonda Bassett, CSR  
JUDGMENT, SENTENCE AND COMMITMENT

This matter came before the Court for sentencing. County Attorney Carlyle K. Bryson appearing in behalf of the State of Utah. Defendant appearing by and through John Musselman.

Mr. Musselman addressed the Court in defendant's behalf. The State responded.

Defendant, having plead guilty to the offense of Aggravated Robbery, a First Degree Felony being now present in court and represented by counsel, and there being no legal reason why sentence should not be imposed, is hereby sentenced as follows:

SENTENCE

The defendant is sentenced to be confined in the Utah State Prison for a term not less than five (5) years to life.

CUSTODY REMAND

The defendant is remanded to the custody of the Utah County Sheriff to be transported by him to the Warden of the Utah State Prison in execution of this sentence.

Exhibit "B"

D. JOHN MUSSELMAN (5582) for:  
ELKINS, MUSSELMAN & MADSEN  
Attorneys for Defendant  
40 South 100 West, Suite 200  
Provo, Utah 84601  
Telephone 374-1212

IN THE SUPREME COURT OF UTAH ,  
STATE OF UTAH

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STATE OF UTAH	:	
	:	CERTIFICATION
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Utah Supreme Court 910350
	:	District Court 901400470
WILLIAM JOSEPH SMITH	:	
	:	
Defendant/Appellant.	:	
	:	

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D. John Musselman, attorney of record for William Joseph Smith, hereby certifies to the Court that the defendant/appellant has been sent a copy of the pending Ander's Brief filed on his behalf and has been given leave to present additional points he feels pertinent to the appeal.

The Defendant was notified and sent a copy of the appeal on March 6, 1992.

DATED this 18 day of March, 1992.

  
D. JOHN MUSSELMAN  
Attorney for Defendant

**Exhibit "C"**



D. JOHN MUSSELMAN (5582) for:  
ELKINS, MUSSELMAN & MADSEN  
Attorneys for Defendant  
40 South 100 West, Suite 200  
Provo, Utah 84601  
Telephone 374-1212

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH	:	MOTION FOR LEAVE TO WITHDRAW
	:	AS COUNSEL
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Utah Supreme Court 910350
	:	District Court 901400470
WILLIAM JOSEPH SMITH	:	
	:	
Defendant/Appellant.	:	
	:	


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D. John Musselman, attorney of record for William Joseph Smith, hereby moves the Court for leave to withdraw as counsel in the above-entitled case.

This Motion is based upon the grounds that defense counsel can find no meritorious issues on appeal and cannot in good faith bring forth an appeal in the behalf of the defendant. Counsel is now withdrawing because there are no further alternatives that can in good faith be brought to the court.

WHEREFORE, counsel respectfully moves the Court for leave to withdraw as counsel for defendant in this matter.

DATED this 18 day of March, 1992.

  
D. JOHN MUSSELMAN  
Attorney for Defendant